UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 53 | Number 3 Article 7

2-1-1975

Constitutional Law -- Gilmore v. City of Montgomery: Is There More to Equal Protection Than State Action?

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ture, the Government should be able to utilize whatever evidence is available in bringing suit under section 7 of the Clayton Act.[54] Practical as well as policy considerations, however, prevent a section 7 defendant from enjoying a similar latitude. This in itself does not mean that the Government enjoys a "heads-I-win, tails-you-lose" advantage over its adversaries, for often the restrictions placed on the defendant's use of post-acquisition evidence will be completely justifiable, for reasons not applicable to similar use by a prosecuting authority. Where courts have automatically applied restrictive shibboleths to the defendant's use of such evidence, however, this criticism has had some validity. Hopefully the Supreme Court in *General Dynamics* has abdicated such a rigid approach for the future, in favor of a more discriminating analysis.

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Constitutional Law—Gilmore v. City of Montgomery: Is There More to Equal Protection Than State Action?

Ratification of the fourteenth amendment in 1868 guaranteed that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[1] Fifteen years later the United States Supreme Court in the *Civil Rights Cases* "embedded in our constitutional law"[2] the principle "that the action inhibited by the . . . [equal protection clause] is only such action as may fairly be said to be that of the States. That amendment erects no shield against merely private conduct, however discriminatory or wrongful."[3] Thus a violation of the fourteenth amendment necessitates a finding of two factors.[4] First, it requires a finding of state action.[5] Secondly, there must be a finding of a substantive denial of equal protection, a denial that must

54. *Contra*, Neal, *supra* note 27.

1. U.S. CONST. amend. XIV, § 1.
2. Shelley v. Kraemer, 334 U.S. 1, 13 (1948), *citing* Civil Rights Cases, 109 U.S. 3 (1883).
3. *Id.*
4. Civil Rights Cases, 109 U.S. 3, 11 (1883).
5. Note, *Private Clubs: Freedom of Association Overlooked in Effort to Guarantee Equal Protection*, 23 SYRACUSE L. REV. 905, 910 (1972); *see* Bell v. Maryland, 378 U.S. 226 (1964).

be "wrongful" in the sense that no countervailing interest exists that makes it permissible.[6]

The complex variety of possible circumstances and changing social, moral, and political values have caused the courts to develop equal protection principles on a case by case basis.[7] Although it has emphasized state action, the Court has neglected the development of the substantive requirement.[8] By posing the technical requirement of state action as the sole criterion for finding the existence or nonexistence of constitutionally prohibited discrimination,[9] the Court has been able to ignore the hard decisions involved in defining "wrongful discrimination."[10] In *Gilmore v. Montgomery*,[11] the Burger Court has indicated that it will continue this trend.

In 1958 the petitioners asked for an injunction to desegregate the public parks of the city of Montgomery. The federal district court granted the injunction,[12] and the court of appeals affirmed, modifying the order so that the district court retained jurisdiction.[13] In spite of this order the city continued to allow segregated private school and non-school groups to use the facilities for events such as football and baseball games. Therefore, on a motion for supplemental relief, the district court prohibited the city from allowing access to public recreational facilities to either school or non-school segregated groups.[14] The court of appeals modified this order to allow use by segregated private groups and nonexclusive use by segregated school groups.[15]

The Supreme Court affirmed the prohibition on exclusive use by segregated school groups, but reversed the court of appeals' allowance of use by segregated private groups and nonexclusive use by segregated school groups. The Court based these reversals on the insufficiency

6. Civil Rights Cases, 109 U.S. 3, 11 (1883).

7. *See* Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552 (1947). In Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), the Court stated that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

8. Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966).

9. Comment, *A Statement Against State Action*, 37 S. CAL. L. REV. 463, 467 (1964).

10. Note, *Equal Protection—State Liquor License to Private Club Held Not Significant State Action*, 47 TUL. L. REV. 906, 912 (1973).

11. 417 U.S. 556 (1974).

12. Gilmore v. City of Montgomery, 176 F. Supp. 776 (M.D. Ala. 1959).

13. City of Montgomery v. Gilmore, 277 F.2d 364 (5th Cir. 1960).

14. Gilmore v. City of Montgomery, 337 F. Supp. 22 (M.D. Ala. 1972).

15. Gilmore v. City of Montgomery, 473 F.2d 832 (5th Cir. 1973).

of the record and remanded to the lower court.[16] In remanding for determination of these issues, the Court laid down guidelines for use by the lower court in analyzing the alleged denial of equal protection.

In finding the necessary state action in the exclusive use by school groups, *Gilmore* relied on several factors established by previous decisions as indicative of state action in school desegregation cases. In *Cooper v. Aaron*[17] the Court had held that "[s]tate support of segregated schools through any arrangement, management, funds, or property cannot be squared with the amendment's command that no state shall deny . . . equal protection of the laws."[18] Later cases restricted *Cooper* by holding that generalized services such as electricity, water, and police and fire protection are outside of state action.[19]

Gilmore "fleshed out" this skeleton by stating three factors[20] that, if found to be the effect of city policy, demonstrated state action: (1) enhanced attractiveness, (2) capital savings, and (3) concessions generating revenue. For example, the use of city football stadiums allowed the segregated schools to avoid building facilities of their own. This significant capital saving could be used to fill other needs thus making segregated schools more attractive and thwarting the implementation of a unified desegregated public school system.

The Court suggested that these factors are also relevant in finding state action in nonexclusive use by segregated schools.[21] Use of the facilities in common with others, however, would not provide as much benefit to the private schools. Fewer facilities would be available, and opportunities to generate revenue from concessions would be limited. Therefore, the Court concluded that the potentially lessened benefit

16. 417 U.S. at 570, 575.

17. 358 U.S. 1 (1958). In this case in which the school board attempted to postpone a desegregation plan, the Court came out strongly against any state action which would impede desegregation.

18. *Id.* at 19.

19. Norwood v. Harrison, 413 U.S. 455, 465 (1973); *see, e.g.*, Granes v. Walton County Bd. of Educ., 465 F.2d 887 (5th Cir. 1972); McNeal v. Tate County School Dist., 460 F.2d 568 (5th Cir. 1971); Poindexter v. Louisiana Fin. Ass'n Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968); Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala. 1967); Griffin v. State Bd. of Educ., 239 F. Supp. 560 (E.D. Va. 1965), *modified*, 296 F. Supp. 1178 (E.D. Va. 1969).

20. 417 U.S. at 569. The court of appeals found the "capital savings" to be of "more practical significance," 473 F.2d at 837, while the district court saw the third factor, "concessions generating revenue," as "more significant." 337 F. Supp. at 25.

21. The Court stated that "such assistance, although proffered in common with fully desegregated groups, might so directly impede the progress of court-ordered school desegregation . . . that it would be appropriate to fashion equitable relief 'adjusting and reconciling public and private needs.'" 417 U.S. at 571.

to the schools would merit approaching the situation on the facts of each case to determine the extent of the impairment of school desegregation orders.[22]

To find state action in use of public facilities by private segregated groups, *Gilmore* examined the extent of state involvement.[23] The Court had used this criterion before in *Burton v. Wilmington Parking Authority*[24] in which the discrimination occurred in a private restaurant located on public property. *Burton* held that benefits mutually conferred on the owner and the State, in combination with public ownership of the property, significantly involved the State and therefore constituted state action.[25] In *Gilmore* the Court emphasized that not all state involvement constituted state action. It classified municipal recreational facilities such as parks, playgrounds and zoos with the traditional state "generalized services" like electricity and water.[26] Consequently the Court required a stronger showing of state involvement and suggested that the rationing of equipment or facilities to private segregated groups by a fixed schedule rather than by allowing use on a first-come first-serve basis might demonstrate the required involvement.[27] In all of these "use" situations, the Court adequately discussed the guidelines for determining state action.

To satisfy the substantive requirement of wrongful discrimination in use of public facilities by segregated private schools, the Court relied on *Brown v. Board of Education*,[28] which had banned discrimination in *public* schools. *Gilmore* refused to allow circumvention of a previous desegregation order for the Montgomery school system[29] by allowing the State to promote segregation indirectly in a *private* school.[30] The Court considered the implementation of a unitary school system to be so important that it overrode countervailing interests.[31]

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22. *Id.*
23. *Id.* at 572.
24. 365 U.S. 715 (1961).
25. In *Burton* the benefits were primarily financial. The Parking Authority would receive revenue from customers parking in the garage while eating at the restaurant and the restaurant received business from people who came primarily to use the garage.
26. 417 U.S. at 574; *see* Norwood v. Harrison, 413 U.S. 455, 465 (1973); Evans v. Newton, 382 U.S. 296, 302 (1966).
27. 417 U.S. at 574.
28. 347 U.S. 483 (1954).
29. Carr v. Montgomery County Bd. of Educ., 232 F. Supp. 705 (M.D. Ala. 1964); 253 F. Supp. 306 (M.D. Ala. 1966); 289 F. Supp. 647 (M.D. Ala. 1968), *aff'd as modified*, 400 F.2d 1 (5th Cir. 1968), *rev'd sub nom.* United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969).
30. 417 U.S. at 569.
31. *Id.*

The requirement of a finding of wrongful discrimination received only cursory treatment in the Court's analysis of park use by segregated private groups. In a "word of caution,"[32] the Court suggested that any action restricting access to public facilities would be closely examined when it involved freedom of association. While the Court recognized that freedom of association may conflict with freedom from discrimination,[33] it failed to offer any guidelines to balance these competing constitutional rights. By failing to confront this conflict, the Court continued a trend toward sole reliance on the requirement of state action as the basis for equal protection decisions.[34]

Initially, wrongful discrimination served as the primary basis for finding a violation of equal protection. State action was a secondary limitation.[35] In *Shelley v. Kraemer*,[36] a case often noted for expanding the concept of state action, the Court realized the necessity of finding wrongful discrimination. It satisfied that requirement by reaffirming the principle that "freedom from discrimination by the states in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment."[37] In recent years, however, the Court has confused the two requirements of the fourteenth amendment to the extent that frequently the sole question posed is whether state action is present.[38] *Burton* studiously avoided the issue of whether wrongful discrimination occurred. In *Reitman v. Mulkey*[39] the Court examined a state constitutional amendment that guaranteed the right of an individual to sell his property to anyone he chose. This amendment was held to have set out the "lawful" right to discriminate and thereby encouraged discrimination. The Court found this to constitute state action and gave little consideration to whether the discrimination was "wrongful."

Gilmore was not the first time the Supreme Court has been faced

32. *Id.* at 575.
33. *Id.*
34. *See* Reitman v. Mulkey, 387 U.S. 369 (1967); United States v. Guest, 383 U.S. 745 (1966); Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
35. Silard, *supra* note 8; Comment, 37 S. CAL. L. REV., *supra* note 9.
36. 334 U.S. 1 (1948).
37. *Id.* at 20. This principle was firmly established in the landmark case of Buchanan v. Warley, 245 U.S. 60 (1917).
38. This problem troubled Justices Black, White, and Harlan in their dissent in Bell v. Maryland, 378 U.S. 226, 326-35 (1963).
39. 387 U.S. 369 (1967). *But see* Note, *Neutral Statute Held Not To Be a Source of Discriminatory State Action: The Emasculation of Reitman v. Mulkey*, 3 RUTGERS-CAMDEN L.J. 155 (1971).

with the conflict between wrongful discrimination and freedom of association. In *Moose Lodge No. 107 v. Irvis*,[40] a black who was denied service at the dining room of a private club solely because of his race, filed for injunctive relief. The Court decided the case on the grounds that the lodge's state liquor license did not supply the necessary state action to find a denial of equal protection. It did not openly confront the issue of whether the discrimination was wrongful in view of the countervailing right of freedom of association.[41] Justice Douglas in a dissent joined by Justice Marshall and quoted by the majority in *Gilmore*[42] acknowledged the valued right of freedom of association. "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. . . . Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires."[43] The Court, however, ignored the opportunity to define the limits of these rights by basing its decision on state action.[44]

In *Gilmore* the Court has again passed over the opportunity to consider this issue. A finding of state action is a valid and necessary determination in deciding whether discrimination falls under the constitutional prohibition. Equally important, however, is the determination that discrimination exists and that there are no countervailing constitutional rights which justify that discrimination.

Language in *Gilmore* stating that "the very exercise of freedom to associate by some may serve to infringe that freedom for others,"[45] indicates that the Court realized that these freedoms conflict.[46] While the Court speaks decisively to the issue of state action, the opinion should have revealed that a balancing[47] of these conflicting rights took place and should also have enunciated the reasons for the decision on that basis. Only if the Court addresses both requirements of the equal protection clause can the lower courts and attorneys be certain on the

40. 407 U.S. 163 (1972). For a discussion of freedom of association see Healy v. James, 408 U.S. 169 (1972); NAACP v. Alabama, 357 U.S. 449 (1958).

41. Note, 23 SYRACUSE L. REV., *supra* note 5; Note, 47 TUL. L. REV., *supra* note 10.

42. 417 U.S. at 575.

43. 407 U.S. at 179-80.

44. Note, 47 TUL. L. REV., *supra* note 10, at 912.

45. 417 U.S. at 575.

46. *See* Silard, *supra* note 8, at 870.

47. For an example of a previous use of a balancing test by the Court in an equal protection issue see Marsh v. Alabama, 326 U.S. 501 (1946).

substantive issue that the conflict of competing constitutional rights has been faced and resolved.

To admit that discrimination may not be wrongful in some circumstances is not a retreat from principles of equality, for the same retreat can be, and arguably is, being made[48] under the colors of state action. Rather it is a move toward honesty; a move for a realistic look at the basic issues that must in fact underlie the Court's decisions.

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Constitutional Law—Tax Exemption for Widows Upheld over Sex Discrimination Challenge

In recent years the fourteenth amendment's equal protection clause and the fifth amendment's due process clause[1] have been used by women to challenge statutes that allegedly discriminated against females on the basis of sex. A few of the cases have reached the United States Supreme Court, and several statutes have been found unconstitutional although no definitive test or rule has emerged from the decisions.[2] In *Kahn v. Shevin*[3] the Court faced a different type of sex discrimination case. Instead of a female plaintiff claiming that she was being denied equal protection, a man brought the suit, charging that a Florida tax exemption discriminated against males. The Court, in

48. Note, *Pennsylvania Liquor Control Board's Licensing at a Private Club Is Not Sufficient State Action Under Equal Protection Clause*, 77 DICK. L. REV. 157 (1972); Note, *Racial Discrimination by Private Club Held Not State Action Despite State Issued Liquor License and Accompanying Regulations*, 41 FORDHAM L. REV. 695 (1973); Note, *Moose Lodge v. Irvis: The Undecided Decision*, 8 NEW ENGLAND L. REV. 251 (1973); Note, *State Liquor License Granted To a Private Club Adhering To Discriminatory Guest Practice Does Not Constitute "State Action" in Violation of the Equal Protection Clause*, 2 TEXAS S.U.L. REV. 338 (1973); Note, *Licensing and Regulation of Private Clubs by State Liquor Control Board Does Not Constitute State Action*, 4 TEXAS TECH. L. REV. 211 (1972).

1. The due process clause in the fifth amendment has been employed by the Supreme Court as an equal protection clause applicable to the federal government; *e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973).

2. *See* text accompanying notes 25-30 *infra*.

3. 416 U.S. 351 (1974).